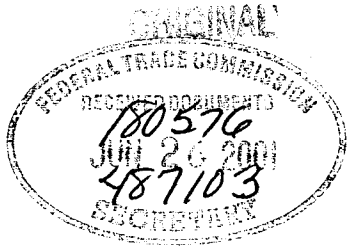
PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
Schering-Plough Corporation, a corporation,	)	
Upsher-Smith Laboratories, a corporation,	)	**Docket No. 9297**
and	)	
American Home Products Corporation, a corporation	)	



SCHERING-PLOUGH CORPORATION'S REQUEST FOR LEAVE TO FILE A REPLY BRIEF

Defendant Schering-Plough Corporation ("Schering") hereby requests leave to file a short reply brief in support of its Motion for a Protective Order preventing Complaint Counsel from taking the depositions of Hans W. Becherer, H. Bradley Morley, Carl E. Mundy and Patricia F. Russo. Schering submits that a reply memorandum will clarify Complaint Counsel's arguments in opposition to the Motion for a Protective Order and thereby be helpful to Administrative Law Judge in considering the motion.

Respectfully submitted,

John W. Nields, Jr.
Marc G. Schildkraut
Laura S. Shores
Charles A. Loughlin
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Respondent
Schering-Plough Corporation

Dated: June 26, 2001

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REPLY MEMORANDUM IN SUPPORT OF SCHERING-PLOUGH CORPORATION'S MOTION FOR A PROTECTIVE ORDER

Defendant Schering-Plough Corporation ("Schering") hereby submits this reply in support of its motion for a protective order regarding the depositions of Hans W. Becherer, H. Bradley Morley, Carl E. Mundy and Patricia F. Russo; four outside members of Schering's Board of Directors.

Schering Has Established Good Cause to Limit Complaint Counsel's Discovery Request

Complaint Counsel argues that Schering has failed to establish "good cause" to support its motion for a protective order. There is abundant authority, however, establishing that "good cause" is shown when the high-ranking official whose deposition is sought is removed from the company's day to day business activities and there is reason to believe that subordinates possess the relevant knowledge.

As acknowledged by Complaint Counsel, "the standard to depose high-level decision-makers who are removed from daily activity [of the company]" was articulated by the court in *Baine v. General Motors Corp.* Opposition at 6 n.17, citing 141 F.R.D. 332, 334 (M.D. Al. 1991). The court stated there that the "[p]arty seeking discovery must demonstrate that the

proposed deponent has 'unique personal knowledge' of the matter at issue." Opposition at 6 n.17, quoting *Baine*, 141 F.R.D. at 334. Unique personal knowledge does not exist where, as here, subordinates with equal or greater knowledge can be deposed in lieu of high-level decision-makers. *See* 141 F.R.D. at 334.

Complaint Counsel cannot meet the "unique personal knowledge" test established in *Baine*. The knowledge that the named directors have regarding the relevant issues is not at all unique. As stated, Complaint Counsel seeks to depose the directors because of their attendance at a single meeting where they heard a presentation about the Upsher licensing agreement. Their knowledge is not unique, however, because the employees who prepared for and gave the presentation would necessarily have at least the same level of knowledge as the directors who passively witnessed the very same presentation. In fact, by virtue of the outside directors' lack of involvement with the underlying business issues, their personal knowledge is likely very limited. As such, Complaint Counsel cannot satisfy the prerequisite established in *Baine* that demands proof of unique personal knowledge in order to take the deposition of high-level decision-makers.

Moreover, the cases cited by Complaint Counsel do not support Complaint Counsel's position that a protective order should not issue. Instead, they support Schering's position. For example, Complaint Counsel cites *High Tymes v. PRN Productions,* in support of its opposition to Schering's motion. *See* 1994 U.S. Dist. LEXIS 21313 (S.D. Ohio 1994). In *High Tymes*, the plaintiff alleged that the musical artist Prince had infringed its copyrighted music, and attempted to depose Prince. *See* 1994 U.S. Dist LEXIS 21313, *1. In *High Tymes*, however, unlike in the present case, Prince was "a named defendant in the lawsuit, rather than an officer of a defendant corporation." 1994 U.S. Dist LEXIS 21313, *16-*17. As such, the court allowed the deposition of Prince to proceed, noting that it was "undisputed that Prince wrote the allegedly infringing material." 1994 U.S. Dist LEXIS 21313, *15-*16. Moreover, based on Prince's business relationship with the individual who allegedly provided him with the copyrighted work, "it is

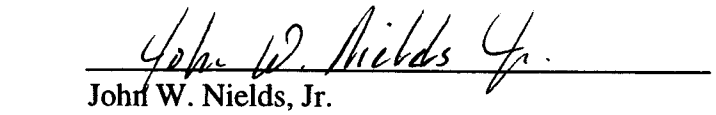
difficult to imagine any individual other than Prince who would have better knowledge of the relevant facts." 1994 U.S. Dist LEXIS 21313, *16-*17.

Unlike Prince, of course, Schering's outside directors are not alleged to be individually liable and are not named defendants in the action. Moreover, as Schering has demonstrated, Schering's outside directors lack the unique personal knowledge that Prince had in *High Tymes.* Accordingly, Schering reasonably has proposed that Complaint Counsel instead depose Schering employees with day to day knowledge of the facts at issue, who would have a unique and more thorough understanding of the relevant facts that the named directors simply do not have.

Thus, the present case is more like *Salter v. Upjohn Co.*, another case cited by Complaint Counsel. *See* Opposition at 5 & n. 13, citing 593 F.2d 649, 651 (5th Cir. 1979). Absent from Complaint Counsel's discussion of *Salter*, however, is the fact that the court granted the exact relief presently requested by Schering. The *Salter* court affirmed an "order [that] vacated plaintiff's notice to take the deposition of [Upjohn's president] . . . and required plaintiff to depose the other employees that Upjohn indicated had more knowledge of the facts . . ." 593 F.2d at 651. *See also Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985).

As in *Salter*, Schering has established good cause for issuance of a protective order. Simply, the named directors are not involved in the daily subjects of the litigation and do not possess the unique personal understanding of the relevant facts required. Finally, the burden imposed on these directors by having to prepare for and attend depositions is undue, because Schering has offered employees with equal or superior knowledge in their stead. For the foregoing reasons, Schering respectfully requests that this Court grant its motion for a protective order.

Respectfully submitted,



John W. Nields, Jr.
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Charles A. Loughlin
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Respondent
Schering-Plough Corporation

Dated: June 26, 2001

CERTIFICATE OF SERVICE

I hereby certify that this 26th day of June, 2001, I caused an original, one paper copy and an electronic copy of Schering-Plough Corporation's Motion for a Protective Order and Memorandum in Support of Schering-Plough Corporation's Motion for a Protective Order to be filed with the Secretary of the Commission, and that two paper copies and an electronic copy were served by hand upon:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

and one paper copy was hand delivered upon:

Richard A. Feinstein
Assistant Director
Bureau of Competition
Federal Trade Commission
Room 3114
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Karen Bokat
Bureau of Competition
Federal Trade Commission
Washington, D.C.
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Christopher Curran
White & Case LLP
601 13th St., N.W.
Washington, D.C. 20005

Cathy Hoffman
Arnold & Porter
555 12th St., N.W.
Washington, D.C. 20004

Erik T. Koons